Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

On Petition for Writ of Certiorari
to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Colorado Supreme Court erred when, adding to a longstanding split between the highest courts of different states that only this Court has jurisdiction to resolve, it interpreted the phrase "declined to exercise" jurisdiction "to make . . . a child custody determination" in 28 U.S.C. section 1738A(f)(2) to cover Missouri courts' deciding the merits of a child custody contest according to a substantive standard different from Colorado's "best interests" standard.

II.

Whether the Colorado Supreme Court consequently committed a violation, which only this Court has jurisdiction to correct and deter, of the requirements of 28 U.S.C. section 1738A(a) that "the appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination . . . made consistently with the provisions of this section by a court of another State."

III.

Whether the Colorado Supreme Court consequently committed also a violation, which only this Court has jurisdiction to correct and deter, of the requirement of 28 U.S.C. section 1738A(g) that "a court of a State shall not exercise jurisdiction in any proceeding for a custody . . . determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising

jurisdiction consistently with the provisions of this section to make a custody . . . determination."

TABLE OF CONTENTS

Questions presented for review i

Table of Authorities v

Citations of the Official Reports viii

Statement of the basis of jurisdiction viii

Constitutional and Statutory Provisions ix

Statement of the facts and case 1

Reasons for granting the writ 9

GROUND I: The Colorado Supreme Court decided an important federal question under the Parental Kidnaping Prevention Act in a way that conflicts with the decision of another state court of last resort, and erred when it concluded that the provision in 28 U.S.C. section 1738A(f)(2) that allows a court of a State to modify a custody determination made by the court of a different state if "the court of the other State . . . has declined to exercise . . . jurisdiction to modify such determination," permits Colorado to modify the Missouri decree simply because Missouri applied a substantive standard other than "the best interests of the child." The Colorado Supreme

Court's decision brings to three the number of states in which the highest courts disagree on this issue of interpretation of section 1738A(f)(2), and this Court is the only court with jurisdiction to resolve the split. 9

GROUND II: The Colorado Supreme Court violated the provision of 28 U.S.C. section 1738A(a) that requires the appropriate authorities of every state to "enforce according to its terms" and to not "modify" the custody determination of a sister state when it reversed the Colorado trial court's order enforcing the Missouri order, and when it instructed the Colorado district court to consider on the merits Respondents' request for modification of the Missouri decree. 26

GROUND III: The Colorado Supreme Court violated 28 U.S.C. section 1738A(g), which prohibits a state from exercising jurisdiction in a proceeding commenced during the pendency of a proceeding in another state that is exercising jurisdiction consistent with section 1738A, when it instructed the Colorado trial court to exercise jurisdiction to decide the merits of this custody dispute. 27

CONCLUSION 29

TABLE OF AUTHORITIES

U.S. CONST., Art. IV, section 1 ..... ix, 9

U.S. CONST., Art. VI, section 2 ..... ix, 11

Mo. Rev. Stat. sec. 453.030(7),(8)(2003) 1

Mo. Rev. Stat. sec. 453.030(7) (2003) 2

Colorado Appellate Rule 21 7

Parental Kidnaping Prevention Act of 1980 (PKPA),
28 U.S.C.A., section 1738A (2003) ..... vii, 7, 8, 11, 13, 27

section 1738A(a)(2003) ..... ix, 11, 15, 17, 26, 27

section 1738A(b) (2003) x

section 1738A(c)(2003) ..... xi, 15-16

section 1738A(c)(2) (2003) 12

section 1738A(d) (2003) ..... xii, 11

section 1738A(f) (2003) ..... xiii, 8, 26

section 1738A(f)(2) (2003) ..... vii, 9, 17

section 1738A(f), (g), (h) 11, 15

section 1738A(g) ..... ii, xii, xiii, 13, 15-16, 27-28

section 1738A (h) 15-16

28 U.S.C. sec. 1738 (2003) 10

28 U.S.C. sec. 1257(a) viii

PARENTAL KIDNAPING PREVENTION ACT OF 1979: JOINT HEARING ON S. 105 BEFORE THE SUBCOMMITTEE ON CHILD AND HUMAN DEVELOPMENT OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES, 96th Cong. 2d Sess. 48 (1980) 10-11

Jerry A. Behnke, Note and Comment, Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes, 28 LOY. L.A. L. REV. 699, 715-16 (1995) 19-20

Russell M. Coombs, Child Custody and Visitation By Non-Parents Under the New Uniform Child Custody Jurisdiction and Enforcement Act: A Rerun of Seize and-Run, 16 J. AM. ACAD. MATRIM. LAW. 1, 111-14 (1999) 12

Herma Hill Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA is the Answer , 84 CAL. L. REV. 703, 726-27 (1996) 19

Michael A. Weinberg, Note, DeBoer v. Schmidt: Disregarding the Child's Best Interests in Adoption Proceedings, 23 CAP. U. L. REV. 1099 (1994) 19

E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982) 17-19, 24

In re Clausen, 502 N.W.2d 649, 652, stay denied sub nom.Deboer by Darrow v. Deboer, 509 U.S. 1301and 509 U.S. 938 (1993) 18, 24

In re Ieronimakis, 831 P.2d 172, 189-90 (Wash. App. Div. 1 1992) 18

In re Marriage of Murphy, 952 P.2d 624
(Wash.App. Div. 3 1998) 11

Kovacs v. Brewer, 356 U.S. 604, 607-608 (1958) 10

Lassiter v. Department of Social Services,
452 U.S. 18, 27 (1981) 17 n.1

People ex rel. A.J.C., 88 P.3d 599
(Colo. 2004) ..... i, viii, 14, 20, 28

People of the State of New York ex rel. Halvey
v. Halvey, 330 U.S. 610, 614-615 (1947) 10

Quillon v. Walcott, 434 U.S. 246,
247-48 (1978) 17 n.1

Smith v. Organization of Foster Families for Equality and
Reform, 431 U.S. 816, 842 (1977) 17 n.1

Stanley v. Illinois, 405 U.S. 645, 651 (1972) 17 n.1

Thompson v. Thompson, 484 U.S. 174
(1988) 10, 12-13, 20, 24

Troxel v. Granville, 530 U.S. 57 (2000) ..... 17 n. 1

CITATIONS OF THE OFFICIAL REPORTS

People ex rel. A.J.C. 88 P.3d 599 (Colo. 2004)

STATEMENT OF THE BASIS OF JURISDICTION

The Colorado Supreme Court entered its ruling on April 12, 2004. On April 26, 2004, Petitioner filed a timely Petition for Rehearing. The Petition for Rehearing was denied May 3, 2004. Jurisdiction of this Court is invoked under Title 28, United States Code §1257(a) as the issues presented involve the interpretation of Title 28, United States Code §1738A and the rights afforded to the Petitioner under that statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Art. IV sec. 1

> Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Art. VI sec. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 28, U.S. Code, sec. 1738A(a):

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in (f)(g) and (h) of this section, any custody determination...made consistently with the provisions of this section by a court of another State.

Title 28, U.S. Code, sec. 1738A(b):

As used in this section, the term–

> (2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;
>
> (3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;
>
> (4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;
>
> (5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;
>
> (6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

Title 28, U.S. Code, sec. 1738A(c):

> A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--
>
> (1) such court has jurisdiction under the law of such State; and
>
> (2) one of the following conditions is met:
>
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

Title 28, U.S. Code, sec. 1738A(d):

The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Title 28, U.S. Code, section 1738A(f):

> [a] court of a State may modify a determination of the custody of the same child made by a court of another State, if (1) it has jurisdiction to make such custody determination; and (2) the court of the other State no longer has jurisdiction, or it has *declined to exercise such jurisdiction to modify such determination.*

Title 28, U.S. Code, sec.1738A(g):

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

STATEMENT OF THE FACTS AND CASE

On April 18, 2003, Petitioner C.M.C ("Mother") gave birth to A.J.C. in St. Louis Missouri. On April 21, 2003, Respondents G.A.L. and K.L. commenced proceedings for adoption and custody of A.J.C. in the Circuit Court of St. Charles County Missouri ("the Missouri trial court"), by filing a Petition for Termination of Parental Rights and Transfer of Legal Custody and Petition for Adoption, and filing Mother's Transfer of Temporary Custody and Appointment of Power of Attorney. See Appendix at 10-11, 80, 102. The Transfer provided that Mother could change her mind prior to the court's acceptance of her consent to termination of parental rights and adoption, and that if she did change her mind, she would reimburse Respondents $20 per day for every day the child had been with them. See ibid.

On April 21, 2003, Mother signed a Consent to Termination of Parental Rights and Consent to Adoption. Pursuant to Mo. Rev. Stat. sec. 453.030(7),(8) (2003), any

consent to termination of parental rights must be approved by the court and may be withdrawn at any time prior to its approval.

On April 21, 2003, the Missouri trial court signed an Order temporarily placing A.J.C. with the Respondents. The Missouri trial court stated that it retained jurisdiction in this matter for a hearing on the Petition for termination, transfer of custody, and adoption. Also filed on April 21st was a document signed by Respondents, entitled Legally at Risk Placement, in which they acknowledged that the placement was "legally at risk"until termination of parental rights. They further agreed that "[i]n the event that termination of parental rights does not occur, then prospective adoptive parents agree to return the child to the intermediary."

On May 15, 2003, the Missouri trial court entered an Order stating that the Consent executed by the birth mother was not approved. See Appendix at 102. At this time, the child was less than a month old. On July 25,

2003, in accordance with Mo. Rev. Stat. sec. 453.030(7) (2003), Mother filed a Motion to Withdraw and Revoke Consent. See id., 102-03. On August 22, 2003, the Missouri trial court entered a Judgment and Order granting Mother's motion to withdraw her consent. See id. at 12. At this time, the child was four months old. Despite their agreement, Respondents did not return the infant child to his mother, but continued to litigate.

In a Response to the Petition for Adoption filed September 10, a Motion to Dismiss filed on September 9, and a Memorandum in Support filed on September 26, 2003, Mother requested that custody of her son be returned to her. See Appendix at 12, 103. On October 15, 2003, the Missouri trial court issued a Judgment of Dismissal of Petition for Adoption and awarded Mother custody of her then-six-month-old child. Appendix at 100. However, Respondents still did not return the child to his Mother.

Instead, on November 3, 2003, Respondents filed

with the Missouri trial court a Motion to Vacate Judgment. A hearing was held on December 5, 2003 and on January 2, 2004, the court denied the Motion to Vacate Judgment. Appendix at 111. The court found that Mother had withdrawn her consent and that despite Respondents' contentions, Mother had not abandoned her child. This finding was based upon the Transfer of Temporary Custody and Appointment of Power of Attorney document she executed, that specifically provided that Mother may change her mind and wish to take back physical custody of her child and further provides that if she does so, she will reimburse Respondents in the amount of $20 for every day the child had been in their care. However, still Respondents did not return the child to his Mother. By this time, January 2004, the child was eight months old.

Respondents filed a Notice of Appeal with the Missouri Court of Appeals Eastern District and filed unsuccessful motions to set Supersedeas Bonds in both

the Missouri trial court and the Missouri Court of Appeals. On March 2, 2004, the Missouri Court of Appeals denied the motion. On March 16, 2004, Respondents dismissed their appeal.

While litigating this matter in Missouri, the Respondents also began to litigate in Colorado. On October 31, 2003, two weeks after the Missouri trial court ordered that physical custody of A.J.C. be returned to his Mother, and four days before the Respondents filed in Missouri the Motion to Vacate the Order awarding Petitioner custody, Respondents filed in the District Court for Jefferson County, Colorado ("the Colorado trial court"), a Verified Petition for Allocation of Parental Responsibilities. On November 3, 2003, the same day that Respondents filed their Motion to Vacate in the Missouri trial court, Mother filed a Petition for Writ of Habeas Corpus in the Colorado trial court, seeking the immediate return of her child. On December 3, 2003, two days before the Missouri trial court held its hearing on

the Motion to Vacate, Mother filed in Colorado an Answer and a Motion to Dismiss the Petition. On December 23, 2003, Respondents filed in the Colorado trial court a request for additional time to respond to the Petition for Writ of Habeas Corpus. On January 3, 2004, just one day after the Respondents had lost again in the Missouri trial court, the Colorado trial court also ruled against them, entered a Writ of Habeas Corpus, and ordered them to immediately return A.J.C. to his Mother. The Colorado trial court dismissed Respondents' Petition, found that the Missouri trial court had previously entered an order awarding Mother custody of her child, and ruled that because Missouri retains continuing and exclusive jurisdiction over the matter, the Colorado trial court does not have jurisdiction. Appendix at 94.

On January 8, 2003, just days after their most recent loss in the Missouri trial court, Respondents filed in the Colorado trial court a Response to the Motion to Dismiss. On January 13, 2003, the Colorado trial court

entered an Order reaffirming its prior rulings, finding that Missouri had original jurisdiction in this matter, denying Respondents' request that it reconsider its granting of the Writ of Habeas Corpus, and dismissing the Verified Petition for Allocation of Parental Rights. Appendix at 97.

Respondents then filed in the Colorado Supreme Court a Petition pursuant to Colorado Appellate Rule 21. On January 20, 2004, the Colorado Supreme Court directed Mother to answer in writing why the relief requested in Respondent's Petition should not be granted. Mother filed a response to the Petition arguing, among other things, that the Missouri court order was entitled to full faith and credit and that the Parental Kidnaping Prevention Act of 1980 (PKPA), 28 U.S.C.A., § 1738A (2003), requires the courts of every state to enforce a child custody determination of a sister state made consistently with the provisions of that Act.

On April 12, 2004, the Colorado Supreme Court

held that while it was obligated to recognize and enforce the order of the Missouri trial court insofar as it dismissed the adoption proceeding, Colorado courts are not obligated to enforce that portion of the Missouri trial court's order that awards custody of the child to his Mother. Appendix at 1. The Colorado Supreme Court held that, because Missouri failed to conduct a best interests analysis in issuing its custody decree, it "declined jurisdiction" to modify that order under section 1738A(f) of the PKPA. The Colorado Supreme Court remanded the matter to the trial court to determine custody based upon the child's "best interests."

On April 26, 2004, Mother filed a Petition for Rehearing arguing that the Colorado Supreme Court's decision is contrary to the mandates of 28 U.S.C. § 1738A and the full faith and credit clause of the United States Constitution. It was denied May 3, 2004. Appendix at 116.

REASONS FOR GRANTING THE WRIT

GROUND I:

The Colorado Supreme Court decided an important federal question under the Parental Kidnaping Prevention Act in a way that conflicts with the decision of another state court of last resort, and erred when it concluded that the provision in 28 U.S.C. section 1738A(f)(2) that allows a court of a State to modify a custody determination made by the court of a different state if "the court of the other State . . . has declined to exercise . . . jurisdiction to modify such determination," permits Colorado to modify the Missouri decree simply because Missouri applied a substantive standard other than "the best interests of the child." The Colorado Supreme Court's decision brings to three the number of states in which the highest courts disagree on this issue of interpretation of section 1738A(f)(2), and this Court is the only court with jurisdiction to resolve the split.

Article IV, section 1 of the United States Constitution provides that

> Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Despite this constitutional requirement and an

implementing statute enacted in the eighteenth century, 28 U.S.C. sec. 1738 (2003), many state courts did not consider custody decrees sufficiently final to trigger full faith and credit requirements. Thompson v. Thompson, 484 U.S. 174, 179 (1988). See People of the State of New York ex rel. Halvey v. Halvey, 330 U.S. 610, 614-615 (1947); Kovacs v. Brewer, 356 U.S. 604, 607-608 (1958). As those who sponsored and supported the passage of the PKPA were aware,

> [C]urrent law in many States encourages a parent who does not have custody to snatch the child from the parent who does and take the child to another State to relitigate the custody issue in a new forum ...[the PKPA] would impose on States a Federal duty, under enumerated standards derived from the [Uniform Child Custody Jurisdiction Act], to give full faith and credit to the custody decrees of other States.

PARENTAL KIDNAPING PREVENTION ACT OF 1979: JOINT HEARING ON S. 105 BEFORE THE SUBCOMMITTEE ON CHILD AND HUMAN DEVELOPMENT OF THE COMMITTEE ON LABOR

AND HUMAN RESOURCES, 96th Cong. 2d Sess. 48 (1980)[testimony of Acting Deputy Attorney General Michel]. Congress thus passed the Parental Kidnaping Prevention Act of 1980 (PKPA), codified at Title 28, U.S. Code, § 1738A. ("Section 1738A"). Colorado is required to follow the express terms of the PKPA. U.S. CONST., Art. VI, sec. 2.

The PKPA applies to the enforcement or modification of an existing custody decree or when a custody action is already pending in another state. In re Marriage of Murphy, 952 P.2d 624 (Wash.App. Div. 3 1998). Section 1738A(a) requires that the appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g),(h), any custody determination made consistently with the provisions of Section 1738A by a court of another state. Section 1738A(d) provides that if a state has made a custody determination, that state's jurisdiction over the matter continues for so long as the

state has jurisdiction under its own law and so long as either the child or one of the contestants continues to reside there. These provisions make exclusive the continuing jurisdiction of the state that duly issued the original decree. See Russell M. Coombs, Child Custody and Visitation By Non-Parents Under the New Uniform Child Custody Jurisdiction and Enforcement Act: A Rerun of Seize and-Run, 16 J. AM. ACAD. MATRIM. LAW. 1, 111-14 (1999) (describing the extent to which the PKPA requires states to respect the exclusive continuing jurisdiction of courts of other states).

The Colorado Supreme Court has clearly transgressed not only the specific terms of the PKPA, but also this Court's directions regarding a state's duties under the PKPA. In Thompson v. Thompson, this Court held that the PKPA

> imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act. ... [T]he State must have jurisdiction under

> its own local law and one of the five conditions set out in section 1738A(c)(2) must be met. Briefly put, these conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the child has no home State and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused [or if the state has continuing jurisdiction under its own laws and either the child or one of the contestants continues to reside in that state]. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, section 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

484 U.S. 174, 175-76 (1988).

It is undisputed, as the Colorado Supreme Court admits in its opinion, that Missouri state law gave it jurisdiction to enter the custody decree, that its jurisdiction was consistent with §1738A, and that Missouri's jurisdiction therefore continued to the exclusion of Colorado courts unless the Missouri trial

court had, within the meaning of Section 738A(f)(2), declined to exercise such jurisdiction to modify its order. See People ex rel. A.J.C., supra, 88 P.3d at 611-12; Appendix at 51-52 (stating that the Missouri court has continuing jurisdiction and that under the PKPA, Colorado courts may not modify its order unless Missouri has declined such jurisdiction.).

Respondents commenced the action in Missouri by filing a Petition for Adoption that included a prayer for a custody award. The Missouri trial court granted temporary custody of the child to the Respondents and reserved jurisdiction over the child until such time as the adoption was finalized. Ultimately the Missouri trial court dismissed the adoption petition while at the same time entering an order requiring that the child be returned immediately to his mother. Respondents filed a new action in Colorado and at the same time continued to litigate in Missouri, requesting that the Missouri trial court reconsider its rulings regarding both adoption and

custody. During the pendency of the Colorado action, the Missouri trial court continued to exercise jurisdiction by holding a hearing and, after finding that the mother had not abandoned the child and was not unfit, again ordering that the child be returned to his mother.

Because the custody determination made by the Missouri trial court complied with the provisions of 28 U.S.C. sec. 1738A(c), and because the Missouri proceeding was pending at the time the Colorado proceeding was commenced, under sec 1738A(g), Colorado was obligated to refrain from exercising jurisdiction. The provisions of the PKPA prohibit Colorado from modifying the Missouri Court's orders awarding custody of A.J.C. to his mother. Section 1738A(a) states in no uncertain terms:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in (f)(g) and (h) of this section, any custody determination...made consistently with the provisions of this section by a court of another State.

Subsection (h) prohibits the modification of a prior

visitation decree of another state unless that other State no longer has jurisdiction to modify or has declined to exercise its jurisdiction. Under Subsection (g), a state must refrain from exercising jurisdiction when an action is already pending in a sister state and the sister state meets the jurisdictional pre-requisites set forth in §1738A(c).

The Colorado Supreme Court, while recognizing the applicability of the PKPA, held that Missouri declined to exercise jurisdiction within the meaning of subsection (f)(2) when it applied the substantive law of its own State rather than the substantive law of the State of Colorado, which requires, in custody disputes between parents and non-parents, the application of a best interest analysis. The Colorado Supreme Court concluded that because Missouri had declined to exercise jurisdiction, the Colorado Courts can modify the Missouri decree and determine the custody of A.J.C. without violating section

1738A(a).[1]

Colorado's decision is the third decision of the highest court of a state contributing to an interstate conflict over interpretation of section 1738A(f)(2). The first decision on this issue was E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982), in which the New Jersey Supreme Court interpreted subsection (f)(2) to mean that another state's

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[1]The applicability of the best interest standard in custody disputes between parents and non-parents is constitutionally suspect. In Troxel v. Granville, 530 U.S. 57 (2000), this Court held that a Washington statute that allowed any person the right to petition the court for visitation and allowed the court to order such visitation if it was in the best interest of the child violated the substantive due process rights of the natural mother. In so concluding, this Court stated:

> The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court.

See also Lassiter v. Department of Social Services, 452 U.S. 18, 27(1981); Quillon v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 842 (1977); Stanley v. Illinois, 405 U.S. 645, 651 (1972), all recognizing the fundamental liberty interest of natural parents in the care and custody of their children.

application of substantive child custody law contrary to New Jersey's "best interests" standard rendered the other state's decision on the merits of custody a "declination of jurisdiction" to decide the case. Eleven years later, the Supreme Court of Michigan adopted an opposite interpretation of subsection (f)(2), that such a decision was an exercise of jurisdiction rather than a declination to exercise it. In re Clausen, 502 N.W.2d 649, 652, stay denied sub nom. Deboer by Darrow v. Deboer, 509 U.S. 1301 (application for stay made to Justice Stevens as Circuit Justice), and 509 U.S. 938 (1993) (application for stay made to Justice Blackmun referred to entire Court). Now, another eleven years later, the Colorado Supreme Court has added to the interstate conflict over this federal issue. See also In re Ieronimakis, 831 P.2d 172, 189-90 (Wash. App. Div. 1 1992) (Kennedy, J., dissenting on other grounds, stating that the Washington court should not have assumed jurisdiction over the child custody dispute, and, citing E.E.B., questioning whether a "decree

which is not based on the best interest of the child is ....a custody determination.")

During these twenty-two years, commentators have published contrasting analyses of this issue. E.g. contrast Herma Hill Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA is the Answer, 84 CAL. L. REV. 703, 726-27 (1996) (calling E.E.B. "for several reasons a highly suspect decision," one of those reasons being that application of the PKPA in the case "would dictate that such a proceeding be brought in Ohio, not New Jersey"), with Michael A. Weinberg, Note, DeBoer v. Schmidt: Disregarding the Child's Best Interests in Adoption Proceedings, 23 CAP. U. L. REV. 1099, 1138 (1994) (contending that "the holding of E.E.B. v. D.A. is correct"). See generally Jerry A. Behnke, Note and Comment, Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes, 28 LOY. L.A. L. REV. 699, 715-16 (1995) (stating that "there remains a sharp difference of opinion among the courts over . . . the

question of whether the PKPA and UCCJA authorize a state to modify a custody decree of another state if that state did not consider the best interests of the child"). In 1988 this Court held that federal district courts lack jurisdiction to resolve such interstate conflicts, see Thompson v. Thompson, supra, 484 U.S. at 187; thus, only this Court can resolve such a persistent disagreement over interpretation of the PKPA. See Behnke, supra, 28 LOY. L.A. L. REV. at 715-16 (stating that "the Supreme Court is the only judicial body with the authority to resolve this conflict").

The Colorado Supreme Court recognized that the Missouri order was a custody determination. People ex rel. A.J.C., supra, 88 P.3d at 603, Appendix at 17 (referring to the Missouri trial court's order as an "order restoring custody of A.J.C. to Mother"); id., 88 P.3d at 608, Appendix at 37 (referring to the Missouri trial court's order as an "order granting custody to Mother"); id., 88 P.3d at 608, Appendix at 37 (referring to the Missouri

trial court's "custody decree" in this case). The Colorado Supreme Court also acknowledged that the Missouri court's jurisdiction was consistent with the PKPA and continued to the exclusion of Colorado, so that Colorado could exercise jurisdiction "only if Missouri has declined such jurisdiction." Id., 88 P.3d at 612; Appendix at 52. However, the Colorado Supreme Court found that the Missouri Court had declined to exercise jurisdiction because it had failed to conduct a best interest analysis in issuing its custody decree. People ex. rel A.J.C., 88 P.3d at 612, Appendix at 54. Therefore, under the logic of the Colorado Supreme Court, Colorado courts are free to exercise jurisdiction, to deny enforcement of the Missouri custody decree, and to modify that decree.

The Colorado Court's interpretation of the phrase "declined to exercise jurisdiction" is erroneous. The Missouri trial court never declined to exercise jurisdiction. To the contrary, pursuant to substantive Missouri law, the Missouri trial court dismissed the

adoption proceeding, and after finding that the mother did not abandon her child, the court determined, by applying Missouri law to that finding of fact, that Mother was entitled to the physical and legal custody of her child. Missouri law is clear- once an adoption proceeding has been dismissed, Missouri Law requires that the child be returned to the natural mother unless there is a finding that she is not fit to raise the child or has otherwise abandoned him. The Missouri Court exercised jurisdiction by both dismissing the adoption proceeding **and** awarding custody of the child to his mother.

The Colorado Supreme Court ruled that because Missouri did not apply Colorado substantive law, Missouri declined to exercise jurisdiction. Colorado, in resolving a custody dispute between a parent and a non-parent, does not recognize the natural parent's liberty interest in raising her child, but instead applies a "best interest" standard in awarding custody as between the non-parent and the parent; the Colorado Supreme Court

held that, under the PKPA, the Missouri courts declined jurisdiction over this best interests issue.

The Colorado Supreme Court's interpretation of the phrase "declines to exercise jurisdiction" guts the entire purpose behind the PKPA, namely, to discourage those involved in custody disputes from seeking relief from a state whose courts might be more sympathetic to their position or whose substantive laws regarding custody or visitation might work to their favor. The Colorado Supreme Court encourages relitigation of custody issues in a new forum, or, as here, ***simultaneous*** litigation in two different states. In so doing, the Colorado Supreme Court makes a mockery of the PKPA, and the full faith and credit principles that underpin it.

"As the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to 'avoid jurisdictional competition and

conflict between State courts.'" Thompson v. Thompson, supra, 484 U.S. at 177.

The Colorado Supreme Court's interpretation that substantive standards relating to custody should be employed in determining jurisdiction under the PKPA results in a return to the situation prior to the passage of the PKPA. It is an open invitation for parties in custody disputes to once again engage in forum shopping. It encourages jurisdictional disputes. In rejecting such a result, and declining to follow the New Jersey example relied upon by the Colorado Supreme Court here, the Michigan Supreme Court stated in In re Clausen:

> We reject the rationale of E.E.B. v. D.A., to the extent that it is cited for the proposition that an order transferring custody pursuant to a judgment determining custody is modifiable per se on a best-interests analysis. . . . [T]his proposition . . . if accepted, would mean that an order granting custody would be enforceable only if the losing party voluntarily complied. Such a construction would invite the losing party to resist transfer, in order to have the court issue an enforcement order, which would form the basis for an opportunity to relitigate best interests. Such a result would introduce a degree of instability into this

> jurisprudence antithetical to the best interests of all parties.

502 N.W.2d 649,675 n. 31 (Mich. 1993). This scenario is exactly what happened here: The proper forum for Respondents to pursue their request for custody was with the Missouri courts, either as a request for visitation in the Missouri trial court or as an appeal in the Missouri Court of Appeals. Rather than pursuing this course of action, the Respondents dismissed their Missouri appeal and proceeded to do precisely what the PKPA was intended to prevent -- they found a new forum in which to litigate their custody dispute. The Colorado Supreme Court, rather than discouraging this behavior and enforcing federal law, rewarded the Respondents by refusing to enforce the Missouri decree.

This Court should grant this petition for writ of certiorari to make it abundantly clear that questions of substantive law and jurisdiction must be kept separate when determining jurisdiction under the PKPA, thereby

ensuring that the law's purpose is served by discouraging forum shopping and requiring enforcement of the custody orders of sister states regardless of whether or not the state that is asked to modify the existing decree agrees with it or with the substantive law of the sister state.

GROUND II:

The Colorado Supreme Court violated the provision of 28 U.S.C. section 1738A(a) that requires the appropriate authorities of every state to "enforce according to its terms" and to not "modify" the custody determination of a sister state when it reversed the Colorado trial court's order enforcing the Missouri order, and when it instructed the Colorado district court to consider on the merits Respondents' request for modification of the Missouri decree.

Because Missouri did not decline to exercise jurisdiction within the meaning of section 1738A(f), and because, as the Colorado Supreme Court acknowledged, only such a declination would have relieved Colorado courts of the obligations in section 1738A(a), the Colorado Supreme Court's misinterpretation of section 1738A(f) led

it to violate section 1738A(a), both by failing to enforce the Missouri custody determination, and by instructing the Colorado trial court to modify it.

GROUND III:

The Colorado Supreme Court violated 28 U.S.C. section 1738A(g), which prohibits a state from exercising jurisdiction in a proceeding commenced during the pendency of a proceeding in another state that is exercising jurisdiction consistent with section 1738A, when it instructed the Colorado trial court to exercise jurisdiction to decide the merits of this custody dispute.

Under Section 1738A(g), a court must refrain from exercising jurisdiction in any proceeding commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of the PKPA to make a custody or visitation determination. The Missouri proceeding was commenced on April 18, 2003; it was continuing at the time that Respondents commenced the Colorado proceeding on October 31, 2003; and it

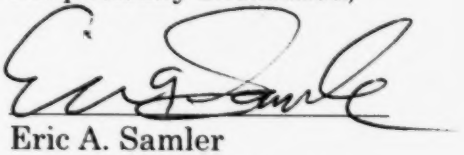
continued until March 2004, when Respondents dismissed their Missouri appeal. Thus, the Colorado Supreme Court violated section 1738A(g) when it instructed the Colorado trial court to decide on remand the merits of this custody dispute.

The Colorado Supreme Court acknowledges that the Missouri court's exercise of jurisdiction was consistent with the PKPA. See People ex rel. A.J.C., supra, 88 P.3d at 611-12; Appendix at 51-52. The only purported reason offered by the Colorado Supreme Court for avoiding application of Section 1738A(g) is its conclusion that the Missouri trial court declined to exercise jurisdiction. This conclusion of the Colorado Supreme Court was erroneous, as explained above in this Petition.

CONCLUSION

Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Colorado Supreme Court and vacate its Order and Judgment. Further, Petitioner requests that this Court stay implementation of the Order and Judgment of the Colorado Supreme Court during the pendency of this petition for a Writ of Certiorari.

Respectfully submitted,



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